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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-619

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner

v.

PILOT FREIGHT CARRIERS, INC.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY MEMORANDUM

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Duly mindful of the admonition of Rule 23(4) ("The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition"), the Petition took pains to confine its description of the facts and argument to matters immediately relevant to the only question presented by the Petition—whether the denial of a motion to dismiss a suit for breach of contract is an order appealable, under 28 U.S.C. § 1291, where the basis

of the motion was that the agreement requires arbitration of the question of breach. Respondent, apparently hopeful that a Petition will be denied if the *Brief in Opposition* confuses matters by contravening the Rule 23(4) standards, faults us for this and discourses at length on 1) the merits of the District Court's decision of non-arbitrability (the issue which we wish the Court of Appeals to decide); 2) the merits of Pilot's breach of contract claim (the issue which we contend is arbitrable); and 3) the rights and wrongs of the underlying strikes. But Pilot does not dispute the soundness of the Second Circuit decision on which we rely (Pet. 7-10), or the public importance of the issue (Pet. 13).

1. The merits of the appeal which the court below dismissed are presently relevant only insofar as the Second Circuit's opinion in *Local 771, I.A.T.S.E., AFL-CIO* v. *RKO General, Inc.*, 546 F.2d 1107 (C.A. 2) implicitly requires the appellant to show that it has a "more than merely colorable" argument that the appellee's breach-of-contract claim is arbitrable. *Id.* at 1112. The Petition demonstrated that the issue of arbitrability was far more than merely "colorable": We pointed out that respondent's own complaints alleged that the contracts "contain[] a grievance procedure established for the purposes of resolving all disputes between the parties involving the application and interpretation of such agreement." (Pet. 3, text and note at note 1); and we quoted the trial court's certification:

> "In all fairness the defendants have put forward controlling legal questions to which substantial grounds for a difference of opinion exists." (Pet. 6, note 4, cont.)

We also quoted the opinion of the Court of Appeals at a prior stage of *Pilot II*:

> "The National Master Freight Agreement in the present case does have a mandatory grievance procedure (Article 3) regarding any dispute under the contract." (Pet. 4, note 2, cont.)

As there is no material difference between the arbitration provisions of the two agreements, that holding establishes at a minimum, the substantiality of our position that respondent's breach of contract claims in both *Pilot II* and *Pilot I* are arbitrable.[1]

2. With respect to *Pilot I*, respondent makes an additional argument of insubstantiality which is of interest chiefly in that it evidences the untrustworthiness of Pilot's representations as to what are "the pertinent, undisputed facts", and "the real facts" (Opp. 11-12). Respondent asserts:

> "And yet, instead of presenting these factual matters to this Court in an effort to show that the essential requirements for an interlocutory appeal have actually been met, the Union merely sets forth broad conclusionary assumptions and carefully avoids mention of the pertinent, undisputed facts which totally negate those assumptions.
>
> As example, the Union's underlying premise is that arbitration is the sole and exclusive method by which resolution may be had of the issues presented in the

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[1] While we take exception generally to respondent's false charges and misstatements (only some of which are discussed herein), we particularly resent the allegation that we concealed the language of the agreements (Opp. 9, 16-17, 18). Since only *appealability* is before this Court, we would have been subject to criticism if we had sought to smuggle in the merits of the appeal, beyond showing, as *RKO General* implicitly requires, that the issue of arbitrability is not insubstantial. Given Pilot's contentions, however, we are constrained to assert in self-defense 1) that it has been settled since *Steelworkers* v. *Warrior & Gulf*, 363 U.S. 574, that even broad exclusionary language does not compel a conclusion that a dispute seemingly within the exclusion is non-arbitrable and 2) that there is a "substantial ground for a difference of opinion" as to the meaning and application of the language on which Pilot relies (Opp. 9)—as the District Court expressly acknowledged in its certification.

District Court cases demonimated PILOT I and II. Yet, as to PILOT I, no reference is made by the Union to the fact that, in 1972, it sought and obtained precisely the same arbitration award it now demands the right to endeavor to secure, or to the fact that such award was nullified in legal proceedings which are *res judicata* and absolutely binding upon the Union.

Thus, when viewed in the light of the real facts, this aspect of the Union's case presents a most peculier spectacle. The ruling ultimately sought by the Union through its Petition to this Court would essentially mean that the arbitration committee, whose award was reversed in effect by the Labor Board and three federal courts, must be given an opportunity, in turn, effectually to reverse that agency and those courts." (Opp. 11-12).

But it is *not* a "fact" that the arbitration award which the Union obtained in 1972 in *Pilot I* was "the same" as that which "it now demands the right to endeavor to secure", and "which was nullified in [prior] legal proceedings." The 1972 award was on *a union* grievance that *Pilot had breached the agreement* by failing to extend to its new Florida operation (see Opp. 2); there was no award on the Company's present claim that Petitioner had breached the agreement by striking. The reasons the Board and the courts gave for disapproving the award establish nothing with respect to Pilot's breach of contract claim. An unfair labor practice is not *per se* a breach of contract, and the District Court demonstrated its own view that its prior ruling in *Pilot I* was not dispositive by certifying that the issue of arbitrability was substantial and that a prompt appellate disposition thereof would expedite this litigation.[2] Accordingly, there is

[2] Actually, there were two identical awards. The original award was made by the Southern Conference Committee and was set aside by the District Court on the ground that only the National Committee had jurisdiction. (Opp. 3-4). Thereupon the union's grievance was heard anew by the National Committee and again sustained. But the NLRB determined that it would be an unfair labor practice to enforce the award because it was not a proper accretion to the original unit (Opp. 4-6). The Fifth Circuit decision which is quoted at Opp. 4-5 sustained an injunction under § 10(j) of the NLRA, 29 U.S.C. § 160(j), against enforcing or striking to enforce the award pending the Board's disposition of the unfair labor practice charge; the Court expressly stated that "these unfair labor practice charges are complex and to some degree novel, and nothing in this opinion should be read as a pre-judgment of these issues by the Court." *Boire* v. *International Brotherhood of Teamsters, Etc.*, 479 F.2d 778, 803 (C.A. 5.)

no basis whatsoever for the respondents' assertion: "Most obviously, *Pilot I* involves a judicial and not an arbitrative issue." (Opp. 15)

3. With respect to *Pilot II*, Respondent also relies on the District Court's stay of that action pending completion of *Pilot III* which combines the same breach of contract claim with tort claims of violence and illegal secondary boycotting.[3] But despite plaintiff's strategy of first bringing *Pilot II* and then seeking to dismiss that action on its own terms (Opp. 7-8), *Pilot II* remains viable, and the District Court, after granting the stay, itself certified:

Respondent asserts that the strike in *Pilot II* was a continuation of the strike in *Pilot I*, the innuendo being that it was undertaken for an illegal objective. (Opp. 6) Actually, the NLRB has determined that the Company had engaged in "pervasive and outrageous" conduct and that the union was engaged in an unfair labor practice strike. *Pilot Freight Carriers, Inc.*, 223 NLRB 286, 306. While this does not remotely bear on the issue of appealability, it is further evidence that respondent's version of the "facts" cannot be relied upon.

[3] Here again Pilot makes a wholly unwarranted charge of concealment. (Opp. 14). We did not reproduce the stay orders because these were not the orders whose finality is the issue here. For the same reason we did not reproduce the simultaneous order regarding discovery (which respondent likewise omits (Opp. 4a)), although it would have further demonstrated the complexity of the trials which arbitration would avoid, and thus would have lent additional support to our position that the order refusing to dismiss the complaint is appealable under the *Cohen* standards, see Pet. 10.

> "Should the controlling law be otherwise than interpreted by this Court there is no doubt but that time and effort will be spared." (Pet. 6, note 4, cont.)

It so certified doubtless because it recognized that if the Court of Appeals reversed its decision on arbitrability in *Pilot I* and *Pilot II* this would not only terminate those actions, but would also sharply circumscribe the issues in *Pilot III* as well. The contention that the question of appealability raised by the Petition is academic as to *Pilot II*, is therefore without merit; and no such contention is even advanced as to *Pilot I*, which raises the identical question.

4. Although it charges that "the factual recitations in the Petition * * * are demonstrably unreliable" (Opp. 17) respondent *admits* that it made the "complaint allegations", which we described at Pet. 3 (that all disputes under the contract are subject to the contractual grievance procedure) and also that "at one point the Company instituted, and then withdrew, an arbitration proceeding" (Opp. 17, referring to Pet. 5). Respondent characterizes its actions as "procedural undertakings of the Company" which were "simply one aspect of the Company's effort to obtain specific enforcement of the contract requirement that the Union exhaust its contract remedies before proceeding with strike action." (*Id.*) While the Company undoubtedly did what it did in order to obtain an advantage, that in no way detracts from the legal consequences—specifically, as we also argued in the District Court, (see Pet. 4-5), that Pilot may not deny that the NMFA requires it to arbitrate its breach of contract claims against the Union,[4] and that it was bound by its voluntary submission

[4] Indeed, the Company's very success in obtaining injunctions is all the more reason why, under the doctrine of preclusion of inconsistent positions, it may not disavow its allegations regarding the scope of the arbitration provisions. See, e.g. *In re Johnson*, 518 F.2d 246, 252 (10 Cir.), *cert. denied*, 423 U.S. 893; *Scarano* v. *Central Ry. Co. of New Jersey*, 203 F.2d 510, 513 (C.A. 3); 1B *Moore's Federal Practice*, ¶ 0.405[8] at 765-773.

even if the arbitration committee would not otherwise have had jurisdiction.[5] For these additional reasons it is incontrovertible that the union's position that it is entitled to arbitrate Pilot's breach of contract claim is far "more than merely colorable in the present case". *RKO General*, 546 F.2d at 1112-1113. Since the asserted insubstantiality of the appeal is the only ground on which respondent attempts to distinguish *RKO General*, the conflict between that decision and the Fourth Circuit's dismissal of the appeal in the present case is unmistakable.

[5] See, e.g. *Ficek* v. *Southern Pacific Co.*, 338 F.2d 655, 656-657 (C.A. 9); *Island Creek Coal Sales Co.* v. *Indiana-Kentucky Electric Corp.*, 366 F.Supp. 350 (S.D.N.Y.) *aff'd without opinion*, 498 F.2d 1393 (C.A. 2).

CONCLUSION

For the foregoing reasons and those stated in the Petition, certiorari should be granted. We submit also that because neither the Fourth Circuit nor respondent has advanced any basis for disagreeing with the reasoning of *RKO General*, and the analogy between the issue of appealability here and that recently decided in *Abney* v. *United States*, 431 U.S. 651 (see Pet. 10-13) is so close, it may be appropriate to summarily reverse the judgment below with directions to decide the appeal on the merits.

Respectfully submitted,

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